LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 14 1969
JOHN F. DAVIS, CLERK

No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1969

JACK G. BUNCHER, D/B/A THE BUNCHER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MORTON J. COHEN,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement:	
A. The unfair labor practices	2
B. The backpay proceedings	3
Argument	6
Conclusion	10

CITATIONS

Cases:	
National Labor Relations Board v. *Jack G. Buncher d/b/a The Buncher Company*, 316 F. 2d 928	3
National Labor Relations Board v. *Mastro Plastics Corp.*, 354 F. 2d 170, certiorari denied, 384 U.S. 972	7
National Labor Relations Board v. *Remington Rand Inc.*, 94 F. 2d 862	8
Statutes and regulation:	
National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*):	
Section 8(a)(1)	2
Section 8(a)(3)	2
29 C.F.R. 102.52, *et seq*	3

356—774—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 222

JACK G. BUNCHER, D/B/A THE BUNCHER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The Board's supplemental decision and order (Pet. App. 36b–96b) are reported at 164 NLRB No. 31. The *en banc* decision of the court of appeals enforcing the Board's supplemental order (Pet. App. 3b–19b) is reported at 405 F. 2d 787. The Board's initial decision and order (Pet. App. 97b–147b) are reported at 131 NLRB 1444, and the opinion of the court of appeals enforcing that order is reported at 316 F. 2d 928.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1969 (Pet. App. 1b–2b). The petition

for a writ of certiorari was filed on June 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in computing the amount of backpay due employees who had been discriminatorily discharged, it was reasonable in this case for the National Labor Relations Board to use seniority as a basis for determining which of the employees would have been selected for layoff in a series of economic reductions that occurred during the backpay period.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at pp. 148b–150b of the Appendix to the petition.

STATEMENT

A. THE UNFAIR LABOR PRACTICES

On June 30, 1961, the Board decided (131 NLRB 1444) that petitioner's Company had committed a series of unfair labor practices designed to defeat the organizational efforts of the United Steelworkers of America, AFL–CIO. The Board found, *inter alia*, that the Company's layoff of thirteen union adherents at its Nine Mile Run facility violated Section 8(a)(3) and (1) of the Act, in that the Company "was substantially motivated in reducing its staff when it did in order to destroy the Union's majority status and that a substantial factor in its selection of the employees * * * for transfer or layoff, or both, was

the employees' known or suspected union activity." *Id.* at 1461. The Board ordered the Company to offer reinstatement to the thirteen discriminatees and to make them whole for any losses of pay suffered because of the Company's discrimination. Recognizing "that some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force even absent the [Company's] unfair labor practices," the Board further provided that "such possible termination of employment shall also be taken into consideration in computing the backpay due these employees under the terms of this Order." *Id.* at 1445. On June 14, 1963, the court of appeals entered a decree enforcing the Board's order in full. *National Labor Relations Board* v. *Jack G. Buncher, d/b/a The Buncher Company*, 316 F. 2d 928 (C.A. 3).

B. THE BACKPAY PROCEEDINGS

On August 31, 1964, pursuant to the procedure specified in the Board's Rules and Regulations, 29 C.F.R. 102.52, *et seq.*, the Board's Regional Director issued a Backpay Specification and Notice of Hearing (J.A. 750a–752a; 4a–73a).[1] The specification set forth the dollar amounts allegedly due each discriminatee and indicated that the following method of computation had been used: (1) up to May 12, 1960, each of the discriminatees was awarded backpay "in accordance with the weekly average hours worked by the employees of [the Company] at the Nine Mile Run facility"; (2) after that date, when a reduction in

[1] "J.A." refers to the Joint Appendix to the briefs below.

force due to a loss of orders occurred, each discriminatee's entitlement to backpay was determined by "allocating the available jobs at the Nine Mile Run facility among the discriminatees" and "all of the other employees who were employed at [that] facility at the time of the discrimination" in accordance with "their seniority,"[2] and, "when sufficient work was not available at the Nine Mile Run facility for a discriminatee," by allocating the available jobs at the Company's other locations on the same basis (J.A. 5a–5b).

The Company filed an answer to the specification, in which it averred that all the discriminatees would have been selected for layoff on May 12, 1960 (J.A. 753a; 117a, 137a–138a). The Trial Examiner then ordered the Company to specify the criteria it had utilized in determining whom to retain or lay off (J.A. 753; 118a, 138a). The Company filed a response listing ten criteria (J.A. 119a),[3] with an attached chart which purported to apply those criteria to the discriminatees, retained employees, and employees first hired during the backpay period (J.A. 120a–133a).

On August 6, 1965, following a hearing, the Trial Examiner recommended dismissal of so much of the

[2] "Seniority" was based on the employee's most recent hiring date with the Company (Pet. App. 6a).

[3] The ten criteria were: ability to perform available work, rate of pay, productivity, application to work, attitude toward work and willingness to learn, ability to learn new skills, limitation on availability, experience with the Company, experience with other employers, and relative length of service with the Company (J.A. 726a; 119a).

specification as awarded backpay for the period after May 12, 1960, on the ground that the Board, in the earlier unfair labor practice proceeding, had found that the Company did not use seniority "either solely or primarily in the course of its business operations" (J.A. 756).[4] The Board reversed and remanded the matter for further hearing (J.A. 717a–718a), holding that "'an absence of the use of seniority by the Respondent does not render the General Counsel's utilization of seniority in this proceeding arbitrary or unreasonable, *per se*'" (J.A. 718a).

On remand, the Trial Examiner considered the Company's claim that none of the discriminatees would have been rehired after May 12, 1960. He found that the Company's evaluations of employees were not based on any written records, and that its supporting testimony was "fraught with inconsistencies, internal contradictions, exaggerations and implausibilities" (J.A. 730a, 733a). He also found that the Company did not reemploy any of the discriminatees for some two years following their layoff, but hired new employees or rehired other former employees to perform work which the discriminatees admittedly could have performed.[5] Accordingly, the Examiner concluded that "the charted information was contrived for the purposes of denying backpay to the claim-

[4] In the prior proceeding, the Board had stated: "[S]election of men equally competent requires fine decisions, particularly in the absence of a seniority agreement or practice * * *." 131 NLRB 1444, 1460.

[5] J.A. 742a; 420a–422a, 424a, 526a–528a, 534a–535a, 540a–542a, 557a–560a, 579a–581a, 585a–586a, 595a–597a, 615a, 701a–702a, 790a, 791a.

ants" on or after May 12, 1960 (J.A. 733a). He recommended that the Board adopt the Regional Director's backpay specification (J.A. 744a–745a).

The Board affirmed the Examiner's decision. Finding that the Company's "system" had been discredited, the Board concluded that it was thus necessary to devise a "just and reasonable" means of estimating the pay which the employees would have earned but for the Company's unfair labor practices (Pet. App. 41b). The Board further found that, in view of the "extensive use of seniority by other employers in determining layoff and recall, the objective nature of the seniority system, and the complete absence of an alternative offered by the [Company] other than personal judgment," the Regional Director's "utilization of seniority in framing the backpay specification [was] not unreasonable" (Pet. App. 42b–43b). Accordingly, the Board adopted the order of the Examiner, which required the Company to pay the thirteen discriminatees sums ranging from $1,361.30 to $14,438.49 (Pet. App. 45b, 72b).

A panel of the court of appeals (with one judge dissenting) declined to enforce the Board's order (Pet. App. 22b–35b). On the Board's petition for rehearing, the court *en banc* (with three judges dissenting) reversed the panel and sustained the Board's order (Pet. App. 3b–19b).

ARGUMENT

Petitioner does not appear to contest the settled principle, applied by the court of appeals, that, where "an employer has discharged employees discrimina-

torily, but it asserts in mitigation of backpay claims that such employees would have been laid off even absent such discrimination, it has the burden of proving that fact" (Pet. App. 7b).[6] Rather, the questions presented are whether the Board properly concluded that the Company did not sustain its burden of showing which of the discriminatees would in any event have been laid off on and after May 12, 1960, and whether, in these circumstances, it was reasonable for the Regional Director to use seniority as a basis for determining that issue. These questions necessarily turn on the facts of this particular case, and there is no conflict of decisions; thus, there is no occasion for further review. Moreover, as we now show, the court below correctly sustained the Board's decision in this case.

1. In support of its affirmative defense that none of the discriminatees would have been retained after May 12, 1960, the Company produced, at the backpay hearing, a chart purportedly applying to all of the Company's employees the ten criteria (see n. 3, *supra*) allegedly followed in selecting individuals for retention, layoff, or recall. However, this chart, covering the work performance of 225 employees over 4½ years, was constructed in November 1964, solely on the basis of personal recollections of the Company's supervisors (Pet. App. 40b, n. 8, 57b–58b; J.A. 308a, 317a, 467a, 482a–483a, 490a–492a, 636a, 662a). Furthermore, these supervisors not only had participated in the initial unfair labor practices against the dis-

[6] See, *e.g.*, *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 175–176 (C.A. 2), certiorari denied, 384 U.S. 972.

criminatees, but, as the Board found, their testimony contained numerous inconsistencies and exaggerations, in an effort to support the Company's contention that *all* the discriminatees were less desirable than any of the nondiscriminatees (Pet. App. 43b–44b, 60b–67b). In these circumstances, the court below properly concluded that the Board was justified in finding "that the Company's evidence contained so many pervasive infirmities that it was not a reliable basis for deciding the backpay issue." (Pet. App. 7b).

2. With the Company having failed to sustain its burden of proving which discriminatees would in any event have been laid off after May 12, 1960, the Board was faced with the alternative of either assuming that none would have been (cf. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2)), or devising a reasonable layoff formula. Petitioner can hardly complain that the Board adopted the latter alternative which carried a potential for reducing its liability.[7] Nor was the Board arbitrary or unreasonable in using seniority as the basis for estimating which employees could have been laid off. As the court below pointed out, although the "Company did not have a formal seniority system," the "record in this case does indicate that length of service was a factor in its employment 'policy,'" and "the seniority standard represents 'normal industrial practice generally.'" (Pet. App. 8b).

[7] As the seniority formula actually worked out in this case, only one of the discriminatees was found to be ineligible for employment by the Company on and after May 12, 1960; his backpay was cut off as of that date (Pet. App. 46b, n. 2, 52b–53b).

There is no support for petitioner's contention that the use of seniority alone leads to anomalous results in this case. The Company conceded that each of the discriminatees was competent (J.A. 701a–702a), and the record further shows that each was qualified in one of the Company's three major work classifications—welder, heavy-equipment operator, or laborer (J.A. 123a, 201a–220a, 226a–244a, 244a–248a). In these circumstances, it was reasonable for the Board to assume (see J.A. 177a) that appropriate work was available for a discriminatee at any one of the Company's three locations where these skills were in fact utilized. Petitioner now challenges this assumption in one instance, contending that, since only one power shovel was operating, "[m]aybe one of the discriminatees would have worked, but not three" (Pet. 10). It was rational, however, to conclude that John Cindrick, one of the discriminatees, would have been retained on that shovel, since he was concededly "superior" (J.A. 123a, line 28) in that operation and had performed it for several years. The other two discriminatees who were also heavy-equipment operators, James Cindrick and William Greene, while not required on the shovel, were concededly "superior" in operating hi-lifts, dozers, and drag lines (J.A. 123a, lines 27, 29). Since these jobs remained and were filled by employees who were both junior, and either less versatile on heavy equipment (Shearer, J.A. 314a, 123a, line 46) or admittedly careless (Hinger, J.A. 123a, line 47, 509a, 622a–623a), the Board was warranted in allocating these jobs to James Cindrick and Greene.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Associate General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board.

JULY 1969.